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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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JUN 26 2015

Appeal from Lexington County
Honorable Doyet A. Early, III, Circuit Court Judge
Appellate Case Tracking No. 2014-002556

SC Court of Appeals

The State,

Appellant,

vs.

Tiffanie Nicole Turner,

Respondent.

RECORD ON APPEAL

ALAN WILSON
Attorney General

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ATTORNEYS FOR THE RESPONDENT

DONALD V. MYERS
Solicitor, Eleventh Judicial Circuit

ATTORNEYS FOR APPELLANT

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STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

FILED

IN THE COURT OF GENERAL SESSIONS
FOR THE ELEVENTH JUDICIAL
CIRCUIT

2014 NOV 17

The State of South Carolina,
Plaintiff,

WENDY A. DARRIES
CLERK OF COURT
LEXINGTON SC

Ticket No: 45178 GC

vs.

Tiffanie N. Turner,

Defendant.

ORDER

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SC Court of Appeals

This matter was before me today as the Defendant's Motion to Dismiss. Present at today's hearing was Todd Wagoner from the Lexington County Solicitor's Office. Also present was the Defendant with her attorney, S. Jahue Moore, Jr.

The Defendant is currently charged with driving under the influence second offense. After a pre-trial conference on Monday, October 20, 2014, the parties were instructed to be present today for any Pre-trial Motions. The trial, if necessary, would take place on Wednesday, October 22, 2014.

At today's hearing, the Defendant moved for an Order dismissing the charge made against her based upon the State's failure to comply with South Carolina Code Section 56-5-53.

The facts at issue concerning the Defendant's Motion were stipulated to by the parties. On July 25, 2013, the Defendant was driving a vehicle along highway 378 in Lexington County, South Carolina. The Defendant was stopped by a Town of Lexington police officer. The Town of Lexington police office asked the Defendant to exit her vehicle and perform field sobriety tests. During the horizontal gaze nystagmus field sobriety test, the Defendant's back was turned toward the police officer's vehicle and in-car camera. During the horizontal gaze nystagmus test, the Defendant's face and eyes are not visible.

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Lex. Co. C.C.R. C.S. & P.O.

It is impossible from the video obtained in this case to view the results of the Defendant's horizontal gaze nystagmus test. From the video alone, no finder of fact could independently determine the results of the horizontal gaze nystagmus test.

The State contends that simply showing the back for the Defendant's head satisfies South Carolina's video taping statute.

Pursuant to South Carolina Code Section 56-5-2953, the video recording at the roadside must include any field sobriety tests. The purpose of this statute is to create direct evidence of the arrest. STATE V. GORDON, 408 S.C. 536, 543, 759 S.E.2d 755, 758 (Ct. App. 2014). If the actual tests cannot be seen on the recording, the video taping requirement is pointless. *Id.*

Nystagmus is defined as an involuntarily jerking of the eyeball, a condition that may be aggravated by the affect of chemical depressants on the central nervous system. STATE V. SULLIVAN, 310, S. C. 311, 315 N.2, 416 S.E. 2d. 766, 769 N.2 (1993). No nystagmus can be seen in this case because the Defendant's back is turned to the police officer's camera and the actual eyeballs cannot be seen. In order to avoid a pointless statutory requirement, it is at least required that the officer's camera record the Defendant's eyes which would amount to direct evidence of impairment if nystagmus were present.

The purpose of South Carolina Code Section 56-5-2953 is to create direct evidence of a DUI arrest. TOWN OF MOUNT PLEASANT, 39 S.E. 347, 713 S.E. 2d 285. Dismissal of a DUI charge is an appropriate remedy provided by Section 56-5-2953 when a violation of subsection (A) is not mitigated by subsection (B) exceptions. CITY OF ROCK HILL V. SUSCHENSKI, 374 S.C. 12, 17, 646 S.E. 2d 879, 881 (2007). The legislature clearly intended for a per se dismissal in the event a law enforcement agency violates the mandatory provisions of Sections 56-5-2953. TOWN OF MOUNT PLEASANT, 393 S.C. 348, 713 S.E.2d 286. There

being no mitigation factors under subsection (B), a clear statutory violation has occurred. The driving under the influence second offense criminal charge against the Defendant is hereby dismissed.



Doyet A. Early, III
Presiding Judge

Bramble South Carolina
8/20/14, 2014

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State of South Carolina
County of Lexington

Court of General Sessions

State)
)
)
 v.)
)
 Tiffanie Nicole Turner)
)
 Defendant.)

Transcript of Record
2014-GS-32-00469

October 21, 2014
Lexington, South Carolina

B E F O R E:

The Honorable Doyet A. Early, III, Judge.

A P P E A R A N C E S:

Todd Wagoner, Assist. Solicitor
Attorney for the State

S. Jahue "Jake" Moore, Jr., Esquire
Attorney for the Defendant

Bethanie K. Creppon
Circuit Court Reporter

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I N D E X

WITNESS

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(No Witnesses.)

E X H I B I T S

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<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
COURT'S 1	Video	12	

1 (The following proceedings were held on October
2 21, 2014.)

3 MR. WAGONER: Your Honor, the State calls
4 Tiffanie Nicole Turner. It's Indictment
5 2014-GS-32-00469, State of South Carolina vs.
6 Tiffanie Nicole Turner, for driving under the
7 influence, second offense. And I believe Mr. Moore
8 has a motion.

9 THE COURT: Mr. Moore, I'll be glad to hear
10 from you.

11 MR. MOORE: Thank you, Your Honor. May it
12 please the Court.

13 Your Honor, I have a motion to dismiss this
14 case, basically on two grounds.

15 THE COURT: All right. State your grounds.

16 MR. MOORE: Yes, sir. Your Honor, my client
17 was arrested for driving under the influence. She
18 was stopped for speeding, pulled over by an officer
19 with the Town of Lexington Police Department; he
20 came to the window, got her driver's license and
21 some information, asked her to step out of the car.
22 And then, according to the video, the in-car video
23 that was taken, about seven minutes in, he begins to
24 administer some field tests.

25 The first test that he administered was the HGN

1 test about seven minutes in, and he basically had my
2 client with her back facing the camera. The officer
3 was standing in front of her, did the pen test in
4 front of her eyes, but in no way, shape or form on
5 the video can you see my client's eyes.

6 THE COURT: But you can see her head.

7 MR. MOORE: You can see her head. There's
8 absolutely no doubt about the fact that you can see
9 her -- the back of her head. You can't see her
10 entire head, but you can see the back of her head.

11 But, as we all know, the entire point of the
12 Horizontal Gaze Nystagmus Test is to look for
13 nystagmus in a person's eyes.

14 THE COURT: That is correct.

15 MR. MOORE: So there is -- there are no eyes on
16 the video for the purposes of the HGN test.

17 THE COURT: Unless she had eyes in the back of
18 her head, which she did not.

19 MR. MOORE: She did not.

20 THE COURT: All right. Well, we've had a
21 discussion in chambers on this case --

22 MR. MOORE: Yes, sir.

23 THE COURT: -- and we all talked about the 2014
24 case of the *State vs. Cody Roy Gordon*. And in that
25 case, the issue was that whether or not the videoing

1 of the head met the requirements of the statute and
2 an opinion written by Justice Konduros says: The
3 State argues the Circuit Court erred in reversing
4 the Magistrate Court's conviction, the DUI. The
5 State contends the Circuit Court erred in finding
6 the State did not comply with the applicable section
7 because Gordon's head was not visible during the HGN
8 test. It asserts, the statute requires the
9 recording -- that the recording include the field
10 sobriety test, but not that the defendant's head
11 must be visible.

12 And then they go on to hold and it says: The
13 Circuit Court properly found that the Magistrate
14 erred in finding the recording was only required to
15 show the conduct of the defendant. The Magistrate
16 relied on Murphy in making that determination.
17 Although Murphy holds that only the conduct must be
18 recorded, Murphy was based on a prior version of the
19 statute which did not include the specific language
20 regarding the test being recorded.

21 The current version of the statute states: The
22 video recording at the incident site must include
23 any field sobriety tests administered because the
24 purpose of the videotaping is to create direct
25 evidence of the arrest. If the actual test cannot

1 be seen on the recording, the requirement is
2 pointless. Accordingly, the Circuit Court correctly
3 found the head must be shown during the HGN test in
4 order for the sobriety test to be recorded, and we
5 affirm that holding.

6 So there's no issue here that the head is
7 shown, but you're saying, well, that's pointless
8 because, obviously, the requirement must show the
9 actual test, and the actual test is of the eyes.

10 MR. MOORE: That's what the Court actually said
11 itself. They said --

12 THE COURT: But then it goes on to say that the
13 Court frankly found that the head must be shown. So
14 is that all we need is the head must be shown or
15 that the eyes must be shown? Or if the requirement
16 is that the actual test must be seen, is the actual
17 test when they put the pen in front of the eyes and
18 go back and forth? You can't see that from the back
19 of the head, so it would be pointless to video the
20 back of the head and not the eyes.

21 MR. MOORE: Absolutely.

22 THE COURT: But that's not what Justice
23 Konduros says. She says the actual test. So how do
24 you define test?

25 MR. MOORE: Well, Judge, I think, you know -- I

1 think whatever test -- you've got to be able to see
2 it. If the test is to basically determine whether
3 or not somebody's eyes shake, the -- and the point
4 is to create direct evidence of impairment, the
5 direct evidence would be the eyes shaking. And if
6 we can't see the eyes shaking, the actual test is
7 not recorded.

8 THE COURT: Well, she goes on to say: However,
9 because the Magistrate Court found the recording
10 only needed to capture the conduct, it did not make
11 any findings as to whether the entire test,
12 including the head, was on camera. The Circuit
13 Court found that Gordon's head was not sufficiently
14 visible throughout the entire administration of the
15 HGN test. So we're talking about a little something
16 different; we can see the head, we can't see the
17 eyes in this case.

18 Of course they go on to give a footnote which
19 defines the word nystagmus as an involuntary jerking
20 of the eyeball, a condition that may be aggravated
21 by the effect of chemical depressants on the central
22 nervous system; i.e., alcohol. The HGN test
23 consists of the driver being asked to cover one eye
24 and focus the other on an object held at the
25 driver's eye level by the officer. Normally it's a

1 pen, I think.

2 MR. MOORE: Yes, sir.

3 THE COURT: As the officer moves the object,
4 pen, gradually out off the driver's field of vision
5 towards his ear, he watches the driver's eyeballs to
6 detect involuntary jerking.

7 So the test is the actual jerking or nonjerking
8 of the eyeball. And she says -- she being Justice
9 Konduros -- if the actual test cannot be seen on the
10 recording, the requirement is pointless. And the
11 test is of the eyeball and you can't see it from the
12 back of the head; correct?

13 MR. MOORE: Absolutely.

14 THE COURT: Mr. Solicitor, how do we get around
15 that?

16 MR. WAGONER: Again, Your Honor --

17 THE COURT: Again what?

18 MR. WAGONER: I'm sorry.

19 Your Honor, Gordon says that the head must be
20 visible. The head is visible in this particular --

21 THE COURT: That's not what Gordon says.

22 Gordon says that the -- you handed it to me.

23 Gordon says: The current version of the
24 statute states, quote, the video recording at the
25 incident site must include any field sobriety test.

1 And I assume that's the HGN test. And she says --
2 she being Justice Konduros -- the purpose is to
3 create direct evidence of the arrest. If the actual
4 test cannot be seen on the recording, the
5 requirement is pointless. I assume she's talking
6 about the HGN test. And then she says:
7 Accordingly, the Circuit Court correctly found the
8 head must be shown during the HGN test -- well, I
9 assume if you're going to show the eyes, that's the
10 head; you got to show it -- in order for the
11 sobriety test to be recorded, and we affirm that
12 ruling.

13 So you're saying, if they video the head,
14 they're good --

15 MR. WAGONER: Actually --

16 THE COURT: But he's saying they got to show
17 the eyes, which is the test.

18 MR. WAGONER: I think it has to show the head
19 and the actions of the officer, which it does in
20 this particular case. The officer is the one that's
21 conducting the test. His actions are shown on
22 video, therefore it shows the --

23 THE COURT: So you're saying his action of
24 moving the pen -- eye covered, moving the pen, you
25 can see that because we've got the video behind her

1 and you can watch him doing that.

2 MR. WAGONER: You can see his actions.

3 THE COURT: But you cannot see whether or not
4 her eyes jerk according to that footnote.

5 MR. WAGONER: That's correct. You cannot see
6 her eyes bouncing. There's no way --

7 THE COURT: Well --

8 MR. WAGONER: -- to actually do that.

9 THE COURT: -- did they bounce?

10 MR. WAGONER: According to the officer, she
11 did.

12 THE COURT: Well, isn't that the purpose of the
13 test to determine whether or not the officer
14 struggled and --

15 MR. WAGONER: That's the result of the test.
16 The actual test is the actual administration of that
17 particular test.

18 THE COURT: Go ahead. It's -- it creates -- I
19 mean, you have to turn them around to do the video
20 in order to be able to show the results of the eyes
21 and then you don't see what the officer is doing.

22 MR. WAGONER: And therein lies the entire
23 problem. I've had this argument from the officer
24 was in front of the defendant in between the camera,
25 therefore you can't see the defendant's head; the

1 officer was behind the defendant as in relation to
2 the video, therefore you can't see the actions of
3 the particular test.

4 I believe, if I'm not mistaken in this
5 particular case, they were actually situated side by
6 side so you can see the actions of the officer as
7 well as the actions of the defendant during this
8 particular test. And, Your Honor, I'll hand up the
9 video if we can mark that as Court's Exhibit 1.

10 (Court's Exhibit No. 1 marked for
11 identification.)

12 THE COURT: Well, I understand that. But then
13 she goes on in a footnote to say: The HGN test,
14 which you must have on the video -- the test
15 consists of the driver being asked to cover one eye
16 and focus the other eye on an object held at eye
17 level by the officer, and as the officer moves the
18 object -- normally the pen; it doesn't say that, but
19 that's what it is -- gradually out of the driver's
20 field of vision towards his or her ear, he watches
21 the driver's eyeballs to detect involuntary jerking.

22 So the test is the detection of the involuntary
23 jerking. And that is the actual test that must be
24 shown on the recording. But you're saying that's
25 simply the result; the test is being shown because

1 you can see the -- no question he's doing the test.

2 MR. WAGONER: That's correct, Your Honor.

3 THE COURT: Does the statute require simply
4 showing that he's doing the test or simply -- does
5 it simply must show her eyes? I mean, I don't know.

6 MR. WAGONER: The statute merely states that
7 the videotape must include the field sobriety test.

8 THE COURT: I agree with that; that's what it
9 says. But then she says it's pointless if we don't
10 see what's going on.

11 MR. WAGONER: And again, we must interpret
12 statutes so that there's not a bizarre and --
13 bizarre outcome. And in this particular case --

14 THE COURT: I don't know that this is a bizarre
15 outcome. You just turn her around and do the test
16 so you can --

17 MR. WAGONER: And again, the cameras that exist
18 today, if we don't go to Hollywood to second units,
19 do not capture the bounce of the eyeballs. We don't
20 have the capability of that particular quality;
21 therefore, a ruling that you must see the bouncing
22 of the eyeballs, Your Honor, I -- arguably, it could
23 result in dismissal of every single DUI that has HGN
24 test administered.

25 THE COURT: Well, that's -- I guess that's the

1 result of this case. It's not the result of
2 anything else.

3 MR. WAGONER: Well, it -- that interpretation
4 of the law --

5 THE COURT: I'm not being flippant with you. I
6 see exactly what you're saying, the test is being
7 shown.

8 MR. WAGONER: Absolutely.

9 THE COURT: But she pus that footnote in there
10 saying what the test is, which is the showing of the
11 eyeball. It's sort of a quandary. Y'all want me to
12 take it under advisement and not rule and y'all try
13 to work out something? I got to do it one way or
14 the other.

15 MR. WAGONER: I believe that Mr. Moore and I
16 have spoken at length at this --

17 THE COURT: Let me do a plea or two and y'all
18 talk. Because it's going to obviously -- you may
19 want to appeal the ruling, either one of you. I
20 don't know if that would be appealable, but you
21 could certainly appeal the results, however it goes.
22 Let me do a plea or two and y'all step outside and
23 talk.

24 And, by the way, Mr. Moore, do y'all have any
25 other case besides Gordon?

1 MR. MOORE: No, sir, Your Honor. Gordon is
2 what we're standing on.

3 (Pause in the proceedings.)

4 THE COURT: All right. Gentlemen, I've re-read
5 the -- I assume this is what we're all talking
6 about, Section 56-5-2953. Is that where we are?

7 MR. WAGONER: Yes, Your Honor.

8 THE COURT: It says: A person who violates the
9 other sections dealing with DUI must have his
10 conduct at the incident site and the breath-test
11 site recorded -- breath-test site videorecorded.
12 And then it goes on to say: The videorecording at
13 the incident site must begin and it must include any
14 field sobriety tests administered.

15 So the statute requires the videoing of the
16 field sobriety test to show his or her conduct at
17 the incident site. Well, the test that we're
18 talking about, the field sobriety test, is the --
19 what is this, HGN -- the HGN test. So I assume when
20 you read it all together, you have to have that full
21 test recorded, which includes the defendant's
22 conduct, and the test is the testing of the movement
23 of the eyeballs. And, like Justice Konduros, I
24 don't see how the test can have any effect. It
25 would be pointless if you can't see the eyeball.

1 I'm going to grant your motion. Case
2 dismissed.

3 MR. MOORE: Thank you, Your Honor.

4 THE COURT: Do you want a written order?

5 MR. WAGONER: Yes, Your Honor.

6 THE COURT: Get me an order.

7 MR. MOORE: I'd be happy to. Thank you so
8 much, Your Honor, for your time.

9 -- END OF TRANSCRIPT OF RECORD --

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C E R T I F I C A T E

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STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

I, the undersigned, Bethanie K. Creppon, Circuit Court Reporter for the Second Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the captioned cause, relative to appeal in the General Sessions Court for Lexington County, South Carolina, on the 21st of October, 2014.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

January 20, 2015

/s/Bethanie K. Creppon
Circuit Court Reporter

WITNESSES

Lexington Police Department

Earl Alewine

Law Enforcement Case #: 3002916

DOCKET NO. 2014GS3200469

The State of South Carolina
County of Lexington

COURT OF GENERAL SESSIONS

FEBRUARY TERM 2014

THE STATE
VS.

Tiffanie Nicole Turner

CDR #: 3356

Indictment for

Driving Under the Influence – 2nd Offense

§ 56-05-2930(A)

DONALD V. MYERS, SOLICITOR

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DEC 01 2014

SC Court of Appeals

TMW
ARREST WARRANT NUMBER

45178GC

ACTION OF GRAND JURY

TRUE BILL

[Signature]
Foreperson of Grand Jury
Date: *2/10/14*

VERDICT

Foreperson of Petit Jury
Date:

A TRUE COPY

[Signature]
LEX. CL. C.O.F., GIS. & P.O.

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

INDICTMENT FOR
Driving Under the Influence – 2nd Offense

§ 56-05-2930(A)

At a Court of General Sessions, convened on February 2014, the Grand Jurors of Lexington County present upon their oath:

That Tiffanie Nicole Turner, on or about July 25, 2013, did drive a motor vehicle in Lexington County, South Carolina, while under the influence of alcohol to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired, under the influence of any other drug or a combination of other drugs or substances which cause impairment to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired, or under the combined influence of alcohol and any other drug or drugs or substances which cause impairment to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired, such being the second offense within the ten-year period immediately preceding the date of this violation; in violation of Section 56-5-2930, S.C. Code of Laws (1976, as amended)

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SC Court of Appeals

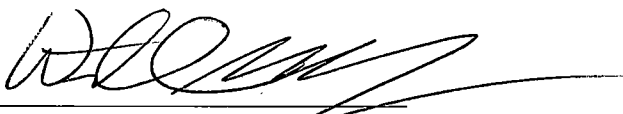
Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ASSISTANT SOLICITOR

3

CERTIFICATE OF COUNSEL

Counsel for Appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

By: 
WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar Number 15608

Office of Attorney General
Post Office Box 11549
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(803) 734-3727

ATTORNEYS FOR APPELLANT

June 26, 2015

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JUN 26 2015
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal From Lexington County
The Honorable Doyet A. Early, III, Circuit Court Judge
Appellate Case Tracking No. 2014-002556

THE STATE,

Appellant,

vs.

Tiffanie Nicole Turner

Respondent.

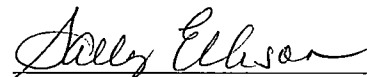
PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Record on Appeal on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Margaret A. Hazel, Esquire
Moore Taylor Law Firm
Post Office Box 5709
West Columbia, SC 29171

I further certify that all parties required by Rule to be served have been served.

This 26th day of June 2015.



SALLY ELLISON
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727



RECEIVED

JUN 26 2015

SC Court of Appeals

ALAN WILSON
ATTORNEY GENERAL

June 26, 2015

S. Jahue Moore, Jr., Esquire
Margaret A. Hazel, Esquire
Moore Taylor Law Firm
Post Office Box 5709
West Columbia, SC 29171

Re: The State v. Tiffanie Nicole Turner
Appellate Case No. 2014-002556

Dear Ms. Hazel:

Enclosed please find two (2) copies of the Record on Appeal, along with proof of service, in the above-referenced State's appeal.

Sincerely,

for William M. Blich, Jr.
Assistant Attorney General

Enclosures

cc: The Honorable Jenny A. Kitchings (original & 9 copies enclosed)
Victim Services